Search King Inc v. Google Inc, et al Doc. 13

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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U.S. DIST. COURT, WESTERN DIST. OF OKLA
BY ________ DEPUTY

SEARCH KING, INC.,
an Oklahoma Corporation,

Plaintiff,

vs.

GOOGLE TECHNOLOGY, INC.,
a California Corporation,

Defendant.

Case No. CIV-02-1457-M

DOCKETED

ORDER

Before the Court is Plaintiff's *Motion for Preliminary Injunction*, filed October 17, 2002. Defendant timely filed a Response and Opposition (hereinafter "Response") to Plaintiff's motion on December 30, 2002. Based upon the parties' submissions, the Court makes its determination.[1]

I. Introduction

Plaintiff SearchKing, Inc. (hereinafter "SearchKing") filed the instant action seeking injunctive relief, compensatory and punitive damages against Defendant Google Technology, Inc. (hereinafter "Google") for tortious interference with contractual relations. Specifically, SearchKing alleges Google purposefully and maliciously decreased the "PageRank" of SearchKing, PR Ad Network (hereinafter "PRAN", and together with SearchKing, "SearchKing"), which is a separate branch of SearchKing, and certain unidentified, affiliated web sites on Google's Internet search

[1]The Court declines to hold an evidentiary hearing on Plaintiff's motion. Where, as here, the material facts are undisputed and the moving party has failed to establish any likelihood of success on the merits, the court need not hold an evidentiary hearing on a motion for preliminary injunction. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1313 (11th Cir. 1998); *Maryland Casualty Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 984 (2d Cir. 1997); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175-76 (3d Cir. 1990); *see also Reynolds and Reynolds Co. v. Eaves*, 149 F.3d 1191 (Table), No. 98-6026, 1998 WL 339465, at *3 (10th Cir. June 10, 1998) (unpublished op.) (finding no Tenth Circuit authority requiring a district court to hold an evidentiary hearing on a motion for preliminary injunction).

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engine in August or September of 2002. SearchKing asserts the devaluation occurred after and because Google learned that PRAN was profiting by selling ad space on web sites ranked highly by Google's PageRank system. The devaluation has allegedly resulted in immeasurable harm to SearchKing's goodwill and business relations. SearchKing moves the Court for a preliminary injunction requiring Google to restore all decreased PageRanks to their previous levels, requiring Google to produce its source code pertaining to SearchKing for the months of August and September of 2002, and prohibiting Google from reducing SearchKing's PageRank during the pendency of this action.

Google admits it intentionally decreased the PageRanks of the web sites at issue. Google asserts, however, that it was entitled to do so for three reasons. First, SearchKing and PRAN's actions (*i.e.,* selling advertising space on highly ranked web sites) undermine the integrity of Google's PageRank system. Second, Google has no obligation to rank SearchKing at its desired level, or to include SearchKing's web site on its search engine. Finally, Google argues its PageRanks represent speech protected by the First Amendment. For these reasons, Google argues a preliminary injunction is inappropriate, and further argues, in a separate motion, that SearchKing has failed to state a claim upon which relief may be granted.

Upon consideration of the parties' submissions, and pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law.

II. Findings of Fact

A. Parties

SearchKing was founded in 1997 as an Internet search engine and web hosting company. SearchKing introduced PRAN as a separate branch of its business in August of 2002. PRAN is in the business of placing advertising and links to client web pages on web sites ranked highly by

Google's PageRank system. PRAN's fee is based, in part, on the PageRank assigned to the web site on which its client's advertisement and/or link is placed. Google, founded in 1998, operates an Internet search engine. The search engine locates web pages that correspond to a user's search query. At the same time, the search engine produces a "PageRank" for each web site referenced in the search.

B. PageRank

A mathematical algorithm is at the heart of every search engine. One component of Google's mathematical algorithm[2] produces a PageRank, which represents the significance of a given web page as it corresponds to a search query. The PageRank is derived from a combination of factors that include text-matching and the number of links from other web pages that point to the PageRanked web site.[3] The higher the PageRank, the more closely the web site in question supposedly matches the search query, and vice versa. The highest possible PageRank is 10, and the lowest is 1. Google does not sell PageRanks, and the web sites that are ranked have no power to determine where they are ranked, or indeed whether they are included on Google's search engine at all.

Notwithstanding the fact that PageRanks cannot be purchased, they do have value. For example, web sites that are highly ranked can charge a premium for advertising space. In this sense, the highly ranked web sites derive a benefit from the PageRank system without a *quid pro quo*. PRAN capitalizes on this benefit by acting as a middleman, charging its clients a fee for locating highly ranked web sites receptive to the idea of advertising on their sites, and in turn compensating those highly ranked web sites with a portion of its fee.[4]

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[2]Google's mathematical algorithm is a trade secret, and it has been characterized by the company as "one of Google's most valuable assets." Aff. of Matthew Cutts, Attach. D to Resp.

[3]PageRanks are not generally displayed to the user conducting a search. However, Google permits any user to download, without charge, a "toolbar" that identifies Google's PageRanks.

C. Devaluation

Google knowingly and intentionally decreased the PageRanks assigned to both SearchKing and PRAN. From approximately February of 2001 until July of 2002, SearchKing's PageRank was 7. In July of 2002, SearchKing's PageRank was increased to 8. Before it was decreased, PRAN's PageRank was 2. In August or September of 2002, SearchKing's PageRank dropped to 4. PRAN's PageRank was eliminated completely, resulting in "no rank." The devaluation has adversely impacted the business opportunities available to SearchKing and PRAN to an indeterminate degree by limiting their exposure on Google's search engine.[5]

III. Conclusions of Law

The party seeking a preliminary injunction must demonstrate: (1) it will suffer irreparable injury in the absence of injunctive relief; (2) the alleged injury to the movant outweighs the injury to the party opposing the motion; (3) the injunctive relief would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001). "Because a preliminary injunction is an extraordinary remedy, the movant's right to relief must be clear and unequivocal." *Id.*

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[4]PRAN's web site contains a disclaimer that provides, in part: "[w]e have no control over what google may or may not do. If they make a PR 9 drop to a PR 8, it doesn't mean that the site has any less link popularity, less traffic or less quality. It only means they are counting things differently. If the site was making you money, it should continue to do so, but remember, we have no way of knowing what you, google or the inventory partner will do at any given time. We are just the brokers." "The Rules," Attach. C to Resp.

[5]SearchKing acknowledges there is no way to quantify the extent to which its business has been adversely affected by Google's actions. This is because "millions of searches are conducted each day on Google.com and . . . millions use Google's tool bar to differentiate between the value of web sites . . . ." Mem. in Supp. of Mot. for Prelim. Inj. (hereinafter "Mem. in Supp.") at 4.

In certain situations, a heightened level of scrutiny applies, and a "movant must show that on balance, the four factors weigh heavily and compellingly in his favor." *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991); *see Dominion*, 269 F.3d at 1154-55; *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). This heightened level of scrutiny is required where (1) the injunctive relief would alter the status quo; (2) the injunction is mandatory, as opposed to prohibitory; and (3) the injunctive relief would afford the movant substantially all of the relief to which the movant would be entitled after a trial on the merits. *See SCFC*, 936 F.2d at 1098-99. The Court concludes the injunctive relief requested in the instant case is mandatory because it requires Google to affirmatively act.[6] *See id.* at 1099 ("Mandatory injunctions . . . affirmatively require the nonmovant to act in a particular way . . . ."). Specifically, the injunction would force Google to change the PageRanks for both SearchKing and PRAN, and it would require that Google disclose the source code pertaining to SearchKing and PRAN for the months of August and September of

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[6]The Court concludes the injunction would neither alter the status quo nor provide SearchKing substantially all of the relief to which it would be entitled after a full trial on the merits. The status quo refers to "the last uncontested status between the parties which preceded the controversy . . . ." *SCFC*, 936 F.2d at 1100 n.8 (quoting *Stemple v. Board of Educ. of Prince George's County*, 623 F.2d 893, 898 (4th Cir. 1980)). Here, the last uncontested status between the parties is precisely what SearchKing is seeking to reestablish via injunctive relief; namely, PageRanks of 8 and 2 for SearchKing and PRAN respectively. Contrary to Google's contention, the disclosure of the source code would not alter the status of the parties, and the Court notes that the disclosure could be accomplished through a protective order or by submission under seal, thereby preserving the confidential nature of the information.

The preliminary injunction would not afford SearchKing substantially all of the relief to which it may be entitled after a trial on the merits because it would exclude money damages. Though certainly speculative, SearchKing's alleged entitlement to money damages (because of decreased exposure on Google's search engine) is the primary motivation for filing the instant action. Because the requested injunction would not award money damages, the Court finds the injunction would not address substantially all of the requested relief.

2002. Therefore, a heightened level of scrutiny applies, and in order to succeed on its motion, SearchKing must establish that the four factors listed above "weigh heavily and compellingly" in its favor. *See id.*

A. Irreparable Harm

The first of four factors that must be addressed requires a consideration of whether SearchKing will suffer irreparable harm absent injunctive relief. Irreparable harm exists "when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Dominion*, 269 F.3d at 1156. The Tenth Circuit has recognized that "[a] threat to trade or business viability may constitute irreparable harm." *Tri-State Generation and Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986).

SearchKing asserts that Google's PageRank decrease has damaged its goodwill and reputation among Internet clients and peers, and that no adequate remedy exists at law to compensate SearchKing for its immeasurable loss. *See* Mem. in Supp. at 4-5. In response, Google argues SearchKing's alleged damages are both speculative and self-inflicted. *See* Resp. at 11-12. Such damages, Google notes, cannot justify injunctive relief. *See Adidas America, Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1281 (D. Kan. 1999) (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)).

SearchKing has alleged it is suffering decreased sales of link and ad placements as a direct result of the decrease to its PageRank. But SearchKing admits that the extent to which it is suffering cannot be quantified, as there is no way to identify the number of potential clients that may have accessed the SearchKing web page, but did not, because of the lower PageRank. Indeed, there is no meaningful way to determine whether any lost business is directly related to the lower PageRank.

There is an important distinction between difficulty in ascertaining damages and engaging in unqualified guesswork. In the case at bar, the latter applies. Because of the speculative nature of SearchKing's damages, and the inability to establish a direct causal connection between the PageRank decrease and the alleged damages, the Court concludes that SearchKing has fallen short of demonstrating irreparable harm in the absence of injunctive relief, particularly in view of the applicable heightened standard of scrutiny.[7]

B. Balancing of Relative Harms

The second factor involves a determination of whether SearchKing has established that the harm it will suffer if injunctive relief is not provided outweighs the potential harm to Google if injunctive relief issues. *See Tri-State*, 805 F.2d at 356-57.

SearchKing submits that "[t]here is no danger of substantial harm to any other party, including Defendant, that would result from the issuance of the preliminary injunction as requested . . . ." Mem. in Supp. at 6. Consequently, SearchKing argues, the "perpetual, and exponentially increasing, harm [to SearchKing] clearly outweighs any harm to Google . . . ." *Id.* Google again argues that SearchKing's damages are speculative, and also claims that the requested injunctive relief would significantly harm Google in two ways. First, the disclosure of Google's confidential source code would compromise its trade secrets and competitive advantage. Second, if an injunction requires Google to increase SearchKing's PageRank, the integrity of Google's PageRank system "will be greatly diminished," *see* Resp. at 12-13, and the injunction would encourage similar complaints from web sites unhappy with their PageRank.

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[7]The Court declines to address the argument that SearchKing's damages were self-inflicted. The speculative nature of the damages alone is sufficient to preclude a finding of irreparable injury.

The Court first notes that any potential damage caused by the disclosure of confidential information could be tempered by appropriate measures designed to maintain the confidential nature of such information, including a protective order or the submission of the information under seal. The Court further notes that the integrity of the PageRank system has already been compromised by virtue of the manual decrease to SearchKing's PageRank. Google's decision to intentionally decrease PageRanks for reasons unrelated to the factors ordinarily taken into account by the mathematical algorithm that produces the PageRank has distorted the objectivity of the PageRank system. Reestablishing previously, and objectively, determined PageRanks would not cause substantial injury to Google.

In light of the foregoing, the Court concludes that while SearchKing's damages may be speculative, they nevertheless outweigh any potential harm to Google if injunctive relief is granted.

C. Public Interest

The third factor requires consideration of the public interest. Specifically, SearchKing must demonstrate that the requested injunction, if issued, would not be adverse to the public interest. *See Dominion*, 269 F.3d at 1154.

In support of that proposition, SearchKing contends "the injunctive relief requested will serve the public by maintain [sic] the integrity of the Internet and [Google's] page rank system." Mem. in Supp. at 6-7. Google counters with a First Amendment argument. Characterizing its PageRanks as protected opinions, Google insists the preliminary injunction would "inhibit the robust debate that the First Amendment seeks to protect." Resp. at 14 (quoting *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Services, Inc.*, 175 F.3d 848, 858 (10th Cir. 1999)).

In *Jefferson County*, the Tenth Circuit held that First Amendment protection extended to a financial rating service's unfavorable review of the value of a school district's refunding bonds. *See*

Jefferson County, 175 F.3d at 852-55. Relying on the Supreme Court's holding that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," *id.* at 852 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)), the Tenth Circuit found the unfavorable review was entitled to First Amendment protection because the information contained in the review was not "provably false." *See id.* at 855. At the same time, the court rejected the school district's argument that the negative review was a form of intentional retaliation against the school district, noting that "even when a speaker or writer is motivated by hatred or illwill his expression [is] protected by the First Amendment." *Id.* at 857-58 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) (alteration in original)).

The Court concludes that *Jefferson County* is analogous to the case at bar. Like the review in *Jefferson County*, a PageRank is an opinion – an opinion of the significance of a particular web site as it corresponds to a search query. Other search engines express different opinions, as each search engine's method of determining relative significance is unique. There is no question that the opinion relates to a matter of public concern. SearchKing points out that 150 million searches occur every day on Google's search engine alone. *See* Mem. in Supp. at 2. Finally, the PageRanks do not contain provably false factual connotations. While Google's decision to intentionally deviate from its mathematical algorithm in decreasing SearchKing's PageRank may raise questions about the "truth" of the PageRank system, there is no conceivable way to prove that the relative significance assigned to a given web site is false. A statement of relative significance, as represented by the PageRank, is inherently subjective in nature. Accordingly, the Court concludes that Google's PageRanks are entitled to First Amendment protection.

In consideration of the foregoing, the Court concludes the requested preliminary injunction would effectively chill speech protected by the First Amendment, and that SearchKing has failed, through its reliance on an argument citing the integrity of the Internet and the PageRank system, to demonstrate that the injunction would not be adverse to the public interest.

D. Substantial Likelihood of Success

The fourth and final prerequisite to obtaining a preliminary injunction is a substantial likelihood of success on the merits. *See Dominion*, 269 F.3d at 1154. SearchKing correctly observes that the Tenth Circuit employs a "modified requirement as to the likelihood of success . . . ." *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). The "modified" requirement applies if "the movant has established the other three requirements for a preliminary injunction." *Id.* at 1195. Under the modified standard, a movant may satisfy the likelihood of success requirement "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation . . . ." *Id.* However, where, as here, the heightened level of scrutiny applies to a preliminary injunction, the traditional likelihood of success requirement should be considered. *See SCFC*, 936 F.2d at 1101 n.11; *see also Kikumura*, 242 F.3d at 955 (citing *SCFC*). In addition, the modified standard would be inappropriate in this case because SearchKing has established only one of the previous three requirements for a preliminary injunction. Thus, the Court must address the question of whether SearchKing has established a substantial likelihood of success on the merits.

SearchKing's two-count Amended Complaint consists of only one true cause of action. Count One is simply a request for injunctive relief, and, as such, does not constitute a separate cause of action. Count Two alleges tortious interference with contractual relations. SearchKing asserts it has established a substantial likelihood of success by alleging that Google purposefully decreased its PageRank, and that SearchKing has been injured as a result.

In *Jefferson County*, the Tenth Circuit rejected the school district's claim for tortious interference with contractual relations on First Amendment grounds. *See Jefferson County*, 175 F.3d at 857-58. Citing *Hustler Magazine*, the court held that "[t]o allow a plaintiff to establish a tort claim by proving merely that a particular motive accompanied the protected speech . . . might well inhibit the robust debate that the First Amendment seeks to protect." *Id.* at 858. Because the PageRanks at issue are protected speech, the Court concludes that under *Jefferson County*, SearchKing's tort claim is likely barred by the First Amendment.

Even if the First Amendment, by itself, does not completely bar SearchKing's claim, the fact remains that SearchKing has not addressed, much less satisfied, the legal test for tortious interference with contractual relations. Under Oklahoma law, an action for tortious interference with contractual relations requires a plaintiff to demonstrate: (1) the defendant interfered with a business or contractual relationship of the plaintiff; (2) the interference was malicious and wrongful, and was *not justified, privileged, or excusable*; and (3) the plaintiff suffered injury as a proximate result of the interference. *See Daniels v. Union Baptist Ass'n*, 55 P.3d 1012, 1015 (Okla. 2001). In the instant case, SearchKing may be able to establish that Google's PageRank decrease interfered with a contractual relationship, and that the interference directly injured SearchKing, thereby satisfying the first and third elements of the legal test. But it is unlikely that SearchKing could satisfy the second element.

While it could be argued that Google acted maliciously and wrongfully as to SearchKing, the Court concludes that Google's actions were nevertheless privileged. Google has no business relationship with SearchKing. Moreover, neither SearchKing nor any other web site has the option of demanding a particular PageRank, or even whether their web site will be accessible on Google's search engine. In short, Google owes no duty to rank, or refrain from ranking, SearchKing or any other web site, and its PageRanks, whether favorable or unfavorable, confer no rights upon the owners or operators of ranked web pages. SearchKing consciously accepted the risk of operating a business that is largely dependent on a factor (PageRank) over which it admittedly has no control. The fact that the company with sole control over that factor has unilaterally changed the impact that the factor has on SearchKing's business cannot give rise to a claim for tortious interference with contractual relations.

Based upon the foregoing, the Court concludes that SearchKing has not established a substantial likelihood of success on the merits.

IV. Conclusion

In sum, SearchKing has not demonstrated that it will suffer irreparable injury in the absence of injunctive relief, that the requested injunction will not be adverse to the public interest, or a substantial likelihood of success on the merits. Therefore, the Court concludes that SeachKing has not shown "that on balance, the four factors [to be considered when addressing a motion for preliminary injunction] weigh heavily and compellingly in [its] favor." *SCFC*, 936 F.2d at 1099. Accordingly, the Court hereby DENIES SearchKing's *Motion for Preliminary Injunction* [docket nos. 3, 4].

IT IS SO ORDERED this 13th day of January, 2003.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE